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Nos. 00-739 and 00-754

In the Supreme Court of the United States

ROBERT S. BELCHER, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

RUSSELL E. SMITH, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under 38 U.S.C. 7292, the United States Court of Appeals for the Federal Circuit has jurisdiction over an appeal from the denial of a claim for veterans' benefits when the claimant's appeal is based on statutes and regulations that were not presented to, or relied upon by, the Court of Appeals for Veterans Claims.

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OPINIONS BELOW

The opinion of the court of appeals in No. 00-739 (00-739 Pet. App. 1-7) is reported at 214 F.3d 1335, and its opinion in No. 00-754 (00-754 Pet. App. 1-8) is reported at 214 F.3d 1331. The opinion of the Court of Appeals for Veterans Affairs in No. 00-739 (00-739 Pet. App. 8-

19) is unreported, and its opinion in No. 00-754 (00-754 Pet. App. 9-17) is reported at 12 Vet. App. 312.

JURISDICTION

The judgment of the court of appeals in No. 00-739 was entered on June 16, 2000. The petition for rehearing was denied on August 21, 2000. The judgment of the court of appeals in No. 00-754 was entered on June 13, 2000. The petition for rehearing was denied on August 16, 2000. The petitions for a writ of certiorari in both No. 00-739 and No. 00-754 were filed on November 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7292(a) provides that "[a]fter a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation * * * or any interpretation thereof * * * that was relied on by the Court in making the decision." 38 U.S.C. 7292(a) (1994 & Supp. IV 1998). This review is available only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(c). The Federal Circuit held that Section 7292(a) did not authorize jurisdiction over the appeal of petitioner in No. 00-739 or the appeal of petitioner in No. 00-754 because the petitioners' arguments invoked statutes and regulations that were neither raised before the United States Court of Veterans Appeals (Veterans Court) nor relied on by the Veterans Court in reaching its decisions. 00-739 Pet. App. 7; 00-754 Pet. App. 8. Because the two petitions present the same question regarding the Federal Circuit's application of 38 U.S.C. 7292(a), the government consolidates its response to the two petitions.

2. a. Robert Belcher, petitioner in No. 00-739, served in the United States Navy from July 1943 to April 1944. 00-739 Pet. App. 1. In 1996, the Board of Veterans Appeals (BVA) denied Belcher's claim for benefits based on an alleged psychiatric disability, finding that the psychiatric condition predated Belcher's military service and was not aggravated by that service. *Id.* at 13. Belcher appealed that decision and the Veterans Court affirmed, holding that the Secretary of Veterans Affairs (VA) established by "clear and unmistakable evidence" that the psychiatric condition predated service and was not aggravated by service. *Id.* at 15-16.

b. Belcher then appealed to the Federal Circuit, arguing that the Veterans Court decision violated 38 C.F.R. 3.304(b)(3), which provides that "[s]igned statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest [are] of no force and effect if other data do not establish the fact." Belcher contended that this regulation also prohibited the Veterans Court from considering 1944 "medical evaluations and diagnoses, where the conclusions of such examinations are based even upon *oral* statements by the veteran 'relating to the origin, or incurrence of any disease or injury.'" 00-739 Pet. App. 3 (emphasis in original). At oral argument, counsel for Belcher admitted that the Section 3.304(b)(3) argument had not been presented to the Veterans Court. *Id.* at 4.

The Federal Circuit noted that its jurisdiction is limited to a review of Veterans Court decisions "with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . *that was relied on by the Court in making the decision.*" 00-739 Pet. App. 4 (quoting 38 U.S.C. 7292(a) (1994 & Supp. IV 1998)).

The court cited its decision a few days earlier in *Smith* v. *West*, 214 F.3d 1331 (Fed. Cir. 2000) (the decision in No. 00-754 discussed *infra*), in explaining that "where the Court of Appeals for Veterans Claims neither addresses a legal issue nor has such an issue presented to it, that court cannot be said to have 'relied on' this issue or argument 'in making its decision," 00-739 Pet. App. 4-5 (quoting 38 U.S.C. 7292(a) (1994 & Supp. IV 1998)) (citing *Smith* v. *West*, 214 F.3d 1331 (Fed. Cir. 2000); *Linville* v. *West*, 165 F.3d 1382, 1384-1385 (Fed. Cir. 1999)). Therefore, because "Mr. Belcher's 38 C.F.R. § 3.304(b)(3) issue was not addressed by or presented to the Court of Appeals for Veterans Claims," the Federal Circuit held that it was "without jurisdiction to consider it." 00-739 Pet. App. 5.

The Federal Circuit explained that this Court's recent decision in *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000), which rejected a judicially-crafted issue exhaustion requirement in appeals of Social Security administrative decisions, did not affect the application of 38 U.S.C. 7292 (1994 & Supp. IV 1998). 00-739 Pet. App. 5. The Federal Circuit noted that *Sims* made clear that it did not cast doubt on statutory issue exhaustion and "38 U.S.C. § 7292(a) speaks directly to the requirement of issue exhaustion." *Ibid.* The Federal Circuit further distinguished *Sims*, noting that "*Sims* deals with review of an agency decision by a court, as opposed to this case, which considers our review of another court's judgment." *Ibid.* (citing 38 U.S.C. 7251 (1994 & Supp. IV 1998)).

3. a. Russell Smith, petitioner in No. 00-754, served in the Marine Corps for three months in 1946 and the Army for fifteen months in 1950 and 1951. Smith appealed a decision of the BVA that denied his most recent request for service-connected disability benefits.

00-754 Pet. App. 1-2. The BVA concluded that petitioner failed to provide new and material evidence in support of his attempt to reopen earlier proceedings. *Id.* at 9. The Veterans Court affirmed the BVA, holding that the BVA did not clearly err in finding the newly submitted evidence merely cumulative. *Id.* at 16.

b. In his appeal to the Federal Circuit, Smith argued that the VA misconstrued 38 U.S.C. 5103(a), which provides that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." Smith contended that this provision required the VA to inform him "as to what would constitute 'new and material evidence'" and the failure to do so violated Smith's due process rights. 00-754 Pet. App. 3. This argument, however, was "never raised nor addressed in the Court of Appeals for Veteran Claims." *Id.* at 6.

The Federal Circuit noted that its jurisdiction to hear appeals from the Veterans Court is "highly circumscribed" under 38 U.S.C. 7292. 00-754 Pet. App. 2. "Compliance with the jurisdictional statute requires that the issue raised on appeal be one of validity or interpretation that the veterans court expressly or impliedly addressed." *Id.* at 4. Thus, as the Federal Circuit had explained previously in *Boggs* v. *West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999), a claimant has "no statutory right of appeal over an issue" that was neither raised nor addressed below. 00-754 Pet. App. 5. Accordingly, the court dismissed Smith's appeal for lack of jurisdiction.[1] *Id.* at 8.

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[1] The court added that Smith's statutory argument was directly "raised and rejected" in *McKnight* v. *Gober*, 131 F.3d 1483

ARGUMENT

The Federal Circuit's decisions are correct and do not conflict with any decision of this Court. Moreover, any tension between these decisions and another decision of the Federal Circuit should be addressed by the Federal Circuit *en banc*, where a petition for *en banc* review filed by the government in that other case is now pending. Review by this court is unwarranted.

1. The Federal Circuit has limited jurisdiction to review decisions of the Veterans Court. As petitioners note, until 1988 there was no judicial review of VA benefits decisions. See 00-739 Pet. 8; 00-754 Pet. 8. The Veteran's Judicial Review Act of 1988 created the United States Court of Veterans Appeals, *ibid.*, and in 38 U.S.C. 7292 authorized a further, "highly circumscribed" layer of judicial review in the Federal Circuit. 00-754 Pet. App. 2. Under Section 7292(a), the Federal Circuit may review Veterans Court decisions only "with respect to the validity of any statute or regulation * * * or any interpretation thereof (other than a determination as to a factual matter) that was *relied on* by the [Veterans] Court in making the decision." 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) (emphasis added). Thus, there is no Federal Circuit review of factual issues or the application of the law to the facts. And the Federal Circuit's review of legal issues is expressly limited to challenges to the validity or interpretation of statutes and regulations that the Veterans Court relied on in making its decision. Section 7292(d) repeats this clear jurisdictional limitation: The Federal Circuit "shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determina-

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(Fed. Cir. 1997), and thus Smith's appeal ran "dangerously close to bringing a frivolous appeal." 00-754 Pet. App. 6-7.

tion as to a factual matter) *that was relied upon in the decision of the Court of Veterans Appeals*." 38 U.S.C. 7292(d) (1994 & Supp. IV 1998) (emphasis added). Thus, in dismissing petitioners' appeals, the Federal Circuit followed Congress's unambiguous intent that the court had jurisdiction to review only those statutes and regulations that the Veterans Court relied on below.

Petitioners do not dispute the fact that the Veterans Court did not rely on the statutes and regulations that formed the basis for petitioners' later appeals to the Federal Circuit. Nor do petitioners contest the Federal Circuit's reading of Section 7292(a)'s plain language. Instead, petitioners argue that other subsections of 38 U.S.C. 7292 expand the Federal Circuit's jurisdiction beyond that provided in Section 7292(a). 00-739 Pet. 13-14; 00-754 Pet. 13-14.[2]

Petitioners' argument ignores the plain language and the structure of 38 U.S.C. 7292. Petitioners highlight the inclusion of the word "any" in Section 7292(c). 00-739 Pet. 13-14; 00-754 Pet. 13-14. But Section 7292(c) is

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[2] This interpretation was not offered before the Federal Circuit, even though petitioner Smith had notice of the Secretary's jurisdictional challenge. See 00-754 Pet. App. 4. The Supreme Court too follows the traditional appellate requirement of issue exhaustion that Congress codified with respect to the Federal Circuit's review of Veterans Court decisions in 38 U.S.C. 7292: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Thus, absent any special circumstances, petitioners' interpretation of 38 U.S.C. 7292 is not properly before the Court with respect to the petition in No. 00-754.

In Belcher's case, the Federal Circuit raised the jurisdictional issue *sua sponte*, so it is less certain that the Supreme Court's issue exhaustion requirement is implicated.

the provision providing exclusive jurisdiction in the Federal Circuit, as opposed to other courts of appeals, over appeals from decisions of the Veterans Court. The expansive language ensures that *any* appeal authorized under Section 7292(a) is brought in the Federal Circuit. Section 7292(c) makes this quite clear: it states that the Federal Circuit has exclusive jurisdiction over any challenge "*brought under this section*," thus referencing the right of review that Section 7292(a) grants. 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) (emphasis added). Section 7292(c) does not provide a party with additional statutory rights of review.

Petitioners also cite language in Section 7292(d) directing that the Federal Circuit "shall decide all relevant questions of law" (00-739 Pet. 13; 00-754 Pet. 13), but omit the following sentence that reinforces Section 7292(a)'s limitation of the Federal Circuit's authority to review of statutes and regulations that were "relied upon in the decision of the Court of Veterans Appeals." 00-739 Pet. 13; 00-754 Pet. 13. 38 U.S.C. 7292(d) (1994 & Supp. IV 1998). Thus, the provisions cited by petitioners actually confirm that Section 7292(a), the only provision granting a party a right of review, limits that review to statutes and regulations that the Veterans Court relied on below. 38 U.S.C. 7292(a) (1994 & Supp. IV 1998).

2. This Court's decision in *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000), upon which petitioners rely (00-739 Pet. 8; 00-754 Pet. 8), provides no support for their position for two reasons.

First, the exhaustion requirement rejected by *Sims* was judicially created, whereas the exhaustion requirement at issue here is created by statute. In *Sims*, the Court expressly distinguished issue exhaustion requirements created by statute or regulation, 120 S. Ct. at

2084, and recognized that such requirements are likely valid. *Ibid.* The Court cited a number of its prior decisions, as well as court of appeals decisions, enforcing statutory or regulatory issue exhaustion requirements for review of NLRB proceedings, see *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), Federal Power Commission proceedings, see *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498 (1955), and Federal Communications Commission proceedings, see *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & n.6 (D.C. Cir. 1983). 120 S. Ct. at 2084 (also citing *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 n.6 (1952)). The *Sims* Court thus emphasized that its treatment of the judicially created issue exhaustion requirement for review of Social Security proceedings in no way affected the statutory issue exhaustion at issue in those cases. Nor does *Sims* affect the statutory issue exhaustion requirement in 38 U.S.C. 7292.

Second, as the court of appeals noted in *Belcher* (00-739 Pet. App. 5), *Sims* rejected an issue exhaustion requirement that would have required the claimant to exhaust issues in a nonadversarial administrative proceeding, whereas the instant cases concern a requirement that parties exhaust issues in a court. *Sims* noted that the rationale for requiring issue exhaustion is weakest in reviewing a nonadversarial administrative proceeding, stronger in reviewing an adversarial administrative proceeding, and strongest in reviewing a court decision. 120 S. Ct. at 2085. Thus, the reasoning that led the Court to reject the issue exhaustion requirement in *Sims* would lead to precisely the opposite result here, where the proceeding under review is a proceeding of the Veterans Court, which is a court of record following formal judicial procedures and where

the parties can be represented by counsel. See 38 U.S.C. 7251 (1994 & Supp. IV 1998) ("There is hereby established * * * a court of record to be known as the United States Court of Appeals of Veterans Appeals."); 38 U.S.C. 7261 (1994 & Supp. IV 1998) (setting forth the scope of review for the Veterans Court); 38 U.S.C. 7263 (1994 & Supp. IV 1998) (allowing legal representation and not binding claimants to the unpaid representation requirements applicable in administrative veterans benefit proceedings); 38 U.S.C. 7264; 38 U.S.C. 7264(c) (applying 28 U.S.C. 455, which deals with disqualification of judges, to the Veterans Court); 38 U.S.C. 7265 (granting the Veterans Court contempt authority).

Thus, the issue exhaustion requirement invoked in the instant cases is in no way inconsistent with *Sims*.

3. Subsequent to the court of appeals' decisions in petitioners' cases, a divided panel of the Federal Circuit decided *Forshey* v. *Gober*, 226 F.3d 1299 (2000), which is in some tension with the decision in these cases. Although the Veterans Court decision did not even mention the specific statutory provision (38 U.S.C. 5107(b)) that served as the basis for Forshey's appeal to the Federal Circuit, the *Forshey* majority held that the Veterans Court had "implicitly relied" on the provision in its decision. 226 F.3d at 1302. Judge Schall dissented from this holding, arguing that the majority's notion of "relied on" would "give this court jurisdiction over arguments challenging the validity or interpretation of any statute or regulation mentioned in a CAVC opinion or inherent to a CAVC decision, regardless of whether the arguments were presented to or considered by the CAVC." *Id.* at 1307. The government agreed that this expansive concept of when the Veterans Court had in fact "relied on" a statute was inconsistent with 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) and the Federal

Circuit's prior application of that jurisdictional limitation, and thus has petitioned for rehearing in *Forshey* and suggested that the court of appeals review that decision *en banc*. The court of appeals has requested a reply to the petition.

The holding that the Veterans Court had "implicitly relied" on the statute was sufficient to satisfy 38 U.S.C. 7292(a), which requires *either* that the Veterans Court considered a statute *or* that the claimant raised the statute. 00-739 Pet. App. 4. The *Forshey* majority proceeded to address whether the court should nonetheless refrain from hearing the argument because Forshey had not raised the argument below. 226 F.3d at 1302-1303. In determining whether the Federal Circuit should impose an issue exhaustion requirement independent of 38 U.S.C. 7292, the court looked to *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000). 226 F.3d at 1303. The majority stated that *Sims* v. *Apfel* applied with "equal, if not greater, force" in the veterans benefits context because the veterans benefit system is "intended to be 'a nonadversarial, ex parte, paternalistic system,' that is 'uniquely pro-claimant.'" *Ibid.* (quoting *Collaro* v. *West*, 136 F.3d 1304, 1309-1310 (Fed. Cir. 1988)). The *Forshey* majority recognized that *Belcher* had distinguished *Sims* (in the context of 38 U.S.C. 7292) on the ground that *Sims* involved "court review of agency decisions" (00-739 Pet. App. 5) as opposed to review of court decisions, but disagreed with that distinction on the ground that "the Veterans Court is not a fact finding body like a district court, and the administrative decision of the board, to the extent we are concerned, passes through the Veterans Court as a matter of law." 136 F.3d at 1302 n.3. In the petition for rehearing and rehearing *en banc*, the government did not argue for an independent issue exhaustion requirement in addition

to 38 U.S.C. 7292(a). The government did note, however, that *Forshey*'s discussion of *Sims* is inconsistent with *Belcher* regarding the nature of Veterans Court proceedings, and urged the Federal Circuit to resolve this inconsistency.

The decision in *Forshey* does not compel review of the *Smith* and *Belcher* decisions by this Court. Petitioners do not contend that the Veterans Court "implicitly relied" on the statute and regulation that formed the bases for their appeals to the Federal Circuit. Rather, petitioners argue that 38 U.S.C. 7292 does not impose an issue exhaustion requirement (00-739 Pet. 13-14; 00-754 Pet. 13-14), or, if it does, such a requirement is no longer valid in light of *Sims* v. *Apfel* (00-739 Pet. 6-12; 00-754 Pet. 6- 12). As discussed above, *Forshey*'s discussion of *Sims* does not address the validity of issue exhaustion in the context of 38 U.S.C. 7292, but instead addresses whether the Federal Circuit could impose an issue exhaustion requirement even if the Veterans Court had "relied on" a statute or regulation and thus satisfied 38 U.S.C. 7292. To the extent *Forshey* and the instant cases are in tension with respect to the application of *Sims* in the veterans benefit area, it "is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). And, regardless of developments in the Federal Circuit, it remains the case that the Federal Circuit's dismissal of petitioners' appeals does not contradict any decision of this Court. *Sims* v. *Apfel* emphasized that it does not call into question either statutory issue exhaustion or issue exhaustion which arises in the context of appellate review of lower court decisions. See 120 S. Ct. at 2084-2085.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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